

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1290

To be argued by
DOMINIC F. AMOROSA

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1290

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANTHONY RICCO, a/k/a "TONY BRAGIOLE",
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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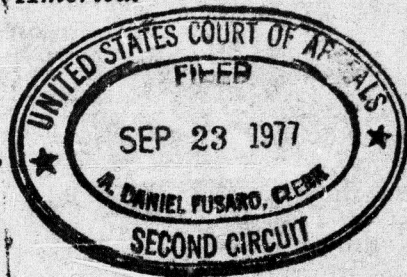


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	3
A. The Government's Case	3
1. Introduction	3
2. The Conspiracy begins	3
3. Rizzieri becomes Rossi's partner and they purchase approximately fifty pounds of heroin from Bragiolo and Ricco	4
4. Rossi withdraws from the conspiracy ..	5
5. Mengrone joins the conspiracy	6
6. Mengrone works for Bragiolo and Ricco	7
7. Mengrone is arrested	9
B. The Defense Case	9
ARGUMENT:	
The Testimony of Peter Mengrone Was Properly Admitted into Evidence	9
A. Background	10
B. The Law	12
CONCLUSION	20

TABLE OF CASES

<i>Alfano v. United States</i> , 555 F.2d 1128 (2d Cir. 1977)	19
<i>Chapman v. California</i> , 396 U. S. 18 (1967)	20

	PAGE
<i>Mitchell v. American Export Isbrandtsen Lines, Inc.</i> , 430 F.2d 1023 (2d Cir. 1970)	18
<i>Monroe v. United States</i> , 234 F.2d 49 (D.C. Cir. 1956), cert. denied, 355 U.S. 875 (1957) .	13, 14, 18
<i>New York v. Saperstein</i> , 2 N.Y.2d 210, 140 N.E.2d 252 (1957)	14
<i>People v. Hughes</i> , 203 Cal. App. 2d 598, 21 Cal. Rptr. 668 (1962)	14
<i>People v. Nicoletti</i> , 34 N.Y.2d 249 (1974)	9
<i>United States v. American Radiator & Standard Sanitary Corp.</i> , 433 F.2d 174 (3d Cir. 1970), cert. denied, 401 U.S. 948 (1971)	18
<i>United States v. Cheung King Ping</i> , 555 F.2d 1069 (2d Cir. 1976)	20
<i>United States 1. Fury</i> , 544 F.2d 522 (2d Cir. 1977)	16
<i>United States v. Gigante</i> , 539 F.2d 502 (2d Cir. 1976)	9
<i>United States v. Head</i> , 546 F.2d 6 (2d Cir. 1976) ..	20
<i>United States v. McKeever</i> , 271 F.2d 669 (2d Cir. 1959)	18
<i>United States v. Anthony Ricco</i> , 421 F. Supp. 401 (S.D.N.Y. 1976)	11
<i>United States v. Rappy</i> , 157 F.2d 964 (2d Cir. 1946), cert. denied, 329 U.S. 806 (1947)	17
<i>United States v. Schwartzbaum</i> , 527 F.2d 249 (2d Cir. 1975)	18
<i>United States v. Walker</i> , 320 F.2d 472 (6th 1963) ..	14

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ANTHONY RICCO, a/k/a "Tony Bragiolo",
Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Anthony Ricco, a/k/a "Tony Bragiolo," appeals from a judgment of conviction entered on June 22, 1977, in the United States District Court for the Southern District of New York after a one-week trial before the Honorable Morris E. Lasker, United States District Judge, and a jury.

Indictment 75 Cr. 411, filed April 23, 1975, in Count One charged Anthony Ricco and eleven others * with conspiracy to violate the federal narcotics laws, in violation of Title 21, United States Code, Section 846. Counts Four, Five, Seven and Eleven charged Anthony Ricco

* The other named defendants were James Rizzieri, Charles Indiviglia, Angelo Ricco, Michael Puglisi, Anthony Zinzi, Willard Williams, Saint Julian Harrison, George Corrado, Anthony Spitalieri, John DiSalvo and Freddie Blase.

and others with substantive violations of the federal narcotics laws, namely, possession with intent to distribute of approximately 461.9 grams of heroin on or about November 22, 1972 (Count Four); two kilograms of heroin in or about November or December 1972 (Count Five); one kilogram of cocaine in or about May or June 1973 (Count Seven); and three kilograms of heroin in or about October 1973 (Count Eleven), in violation of Title 21, United States Code, Section 841.*

Trial commenced against Anthony Ricco alone on April 27, 1977.** On May 5, 1977, the jury found Ricco guilty on Counts One, Seven and Eleven. The Government then consented to dismissal of Counts Four and Five against Ricco.

On June 22, 1977, Judge Lasker sentenced Anthony Ricco as a second federal narcotics felon to seven years' imprisonment on Counts One and Eleven, the sentences to run concurrently, to be followed by six years' special parole. Judge Lasker suspended sentence on Count Seven and placed Ricco on probation for a period of five years.

Ricco is currently at liberty on bail pending this appeal.

* The remaining substantive counts charged defendants other than Anthony Ricco.

** Defendants Angelo Ricco, Indiviglia, Rizzieri, Corrado and DiSalvo were found guilty by a jury after a three-week trial in January 1976 before Judge Lasker. The convictions of Angelo Ricco, Indiviglia and Rizzieri were affirmed by this Court on February 7, 1977 (see *United States v. Ricco*, 549 F.2d 264 (2d Cir. 1977)). (DiSalvo and Corrado did not appeal their convictions.) Prior to that trial Anthony Ricco's motion to sever was granted on the ground that his nephew, Angelo Ricco, would testify in his behalf at a separate trial of his uncle. Thereafter, Angelo Ricco did not testify at Anthony Ricco's trial. Defendants Blase and Zinzi pleaded guilty to the Indictment. Defendants Puglisi, Williams, Harrison and Spitalieri were severed.

Statement of Facts

A. The Government's Case

1. Introduction.

The Government's evidence, presented through the testimony of nine witnesses and numerous exhibits, established a single domestic narcotics chain conspiracy designed to place heroin and cocaine in the hands of their ultimate users. This narcotics conspiracy was described at trial through the testimony of co-conspirators Albert Rossi and Peter Mengrone,* as corroborated by other substantial evidence. Anthony Ricco (hereinafter referred to by his alias "Bragiole") and his nephew, Angelo Ricco, were the suppliers of the narcotics, providing over fifty pounds of heroin to Rossi, Rizzieri, and Blase, who in turn distributed these narcotics to numerous customers including Corrado and DiSalvo. Indiviglia, who was a close associate of Bragiole and Angelo Ricco, also distributed narcotics for and with this organization. Mengrone joined this narcotics organization as a distributor and he continued in this capacity until his arrest in October 1973.

2. The Conspiracy begins.

In February or March, 1971, Rossi borrowed \$5,000 from Bragiole with which he unsuccessfully attempted to import cocaine into the United States. (Tr. 67-72).** In October or November, 1971, after Rossi was unable to repay his debt in full, he met with Bragiole and Angelo Ricco in the Bronx to discuss alternative means of repay-

* Prior to trial, Rossi and Mengrone pleaded guilty to related state and federal narcotics charges.

** "Tr" refers to the trial transcript; "GX" refers to Government exhibits.

ment. It was then agreed that Bragiolo and Ricco would supply Rossi with narcotics on consignment, which Rossi would resell to customers, thereby generating enough cash with which to satisfy his debt to Bragiolo. (Tr. 75-77).

Thereafter, Rossi and his then partner, defendant Freddie Blase, began to receive ounce quantities of high quality heroin from Bragiolo and Ricco. After diluting these drugs to commercial ounces,* Rossi and Blase resold them to their customers. From October, 1971 through July, 1972, Rossi and Blase made approximately 18 purchases of heroin from Bragiolo and Ricco and received approximately \$20,000 from sales of this heroin to their narcotics customers. (Tr. 84, 88-94).**

3. Rizzieri becomes Rossi's partner and they purchase approximately fifty pounds of heroin from Bragiolo and Ricco.

In July 1972, Rossi, Blase and others went to Puerto Rico where Rossi met Rizzieri at the Flomboyen Hotel. This meeting resulted in an agreement between Rossi and Rizzieri to form a narcotics partnership when they returned to New York. (Tr. 100-06). After Rossi returned to New York he met with Bragiolo and Ricco and told them that he was taking on a new partner, Rizzieri, and that they wanted to buy greater quantities of heroin from them for distribution. Bragiolo and Ricco readily agreed to supply them with larger quantities of heroin. (Tr. 106-08).

* A commercial ounce of heroin was defined at trial as an ounce of heroin which had been fully diluted and ready for injection by an addict. (Tr. 81).

** During this period Rossi took on other partners besides Blase. (Tr. 93).

Thereafter, in forty to fifty transactions, from August through December, 1972, Rossi and Rizzieri purchased approximately fifty pounds of high quality heroin from Bragiolo and Ricco.* In turn, Rossi and Rizzieri distributed these narcotics to their numerous customers, realizing at least \$200,000 in cash from the heroin sales. From this money, Rossi and Rizzieri paid approximately \$100,000 to Bragiolo and Ricco. (Tr. 111-16).

4. Rossi withdraws from the conspiracy.

In December 1972, Rossi and Rizzieri purchased two kilograms of heroin for \$56,000 from Bragiolo and Ricco. Ricco represented this sale to consist of pure heroin. Rossi and Rizzieri then attempted to sell these two kilos to one of their narcotics customers, claiming that the goods consisted of pure heroin. After delivery of the two kilos, the customer discovered that the quality of the heroin was only 50% rather than pure, and the heroin was returned to Rossi and Rizzieri. They, in turn, attempted to return the narcotics to Bragiolo and Ricco. Bragiolo and Ricco, however, refused to take it back, arguing that Rossi and Rizzieri were committed to their purchase. (Tr. 159-73).

In January 1973, after Rossi and Rizzieri had paid approximately \$30,000 of the \$56,000 purchase price for the two kilos, Rossi and Rizzieri met Bragiolo and Ricco. In a heated argument Bragiolo and Ricco insisted that Rossi was responsible for the balance of the money owed for the two kilos—\$26,000—notwithstanding Rossi's protests that he and Rizzieri were each responsible for a separate share, namely, \$13,000 apiece. The meeting

* After Rossi and Rizzieri returned from Puerto Rico in later July or early August, 1972, they phased Blase out of their narcotics partnership. (Tr. 107).

ended with Rossi pulling a gun on Rizzieri and announcing that their partnership was at an end. (Tr. 173-77).

Following the January breakup, although Rizzieri continued to purchase heroin from Bragiolo and Ricco, Rossi did not, but terminated his drug dealings with the three men.

In February 1973, Rossi went to Angelo Ricco's home and personally gave Angelo Ricco \$13,000 in cash. Angelo Ricco told Rossi that he was still responsible for the remaining \$13,000 and Rossi agreed. He never paid it and did not see Angelo Ricco again. (Tr. 178-79).

5. Mengrone joins the conspiracy.

In September 1972, Peter Mengrone and his cousin, Georgiani Kunik, opened a bar, called the Magic Carpet, on Morris Park Avenue in the Bronx. (Tr. 624). On numerous occasions from September 1972, through June 1973, this bar was frequented by Bragiolo, Ricco, Rizzieri, Rossi and Indiviglia.* Mengrone observed these men on several occasions entering the bathroom and the kitchen or leaving the bar together or in different combinations. (Tr. 626-29).

By December 1972, Mengrone was in financial difficulty with the bar. Angelo Ricco and Renzo Baronti then gave Mengrone \$8,000 in cash to be invested in the Magic Carpet to defray expenses, in return for a one-half ownership share in the bar. (Tr. 641).

* Rossi stopped coming into the bar in late December 1972. (Tr. 627-28).

In March 1973, Rizzieri was arrested on federal narcotics charges. (Tr. 644-45).^{*} Following Rizzieri's arrest, Mengrone delivered a message which he had received from Rizzieri's girlfriend, to Ricco and Bragiolo. The message was that Rizzieri was "going to stand up, he wasn't going to implicate anybody, he was going to take the fall and nobody had anything to worry about . . ." (Tr. 647-48).

By May 1973, Mengrone's financial difficulties had increased. He owed approximately \$25,000 to various loansharks and had sold his remaining one-half interest in the Magic Carpet to Angelo Ricco for a \$3,000 interest free loan. Mengrone met with Ricco and Bragiolo, told them of his serious financial trouble, and asked them to permit him to work in their narcotics business. Bragiolo agreed and told Mengrone that he should "reach out" for customers interested in heroin and cocaine. (Tr. 649-53).

6. Mengrone works for Bragiolo and Ricco.

In June 1973, Mengrone made arrangements to sell a kilo of diluted cocaine, supplied by Ricco and Bragiolo, to Nick Visciglia. With the proceeds of this sale Mengrone proposed to purchase a kilo of pure cocaine from

^{*} Special Agent Donald Ferrarone of the Drug Enforcement Administration testified that on November 22, 1972, while acting in an undercover capacity, he purchased one-half kilo of heroin from Peter Angiolillo, a/k/a "Pete the Weep," in the presence of Rizzieri. (Tr. 495-501). On February 8, 1973, Ferrarone purchased an additional one-eighth kilogram of heroin for \$3600 from Rizzieri. (Tr. 507-10). On March 14, 1973, Ferrarone arrested Rizzieri and seized from him an additional 223.8 grams of heroin along with a quantity of currency. (Tr. 514-19). Subsequent to Rizzieri's arrest, Peter Donovan, who was with Rizzieri at the time of his arrest and who was also arrested, told Ferrarone that Rizzieri received the heroin which was seized from him at the time of his arrest from Bragiolo. (Tr. 553-54).

Gary Pearson and DiSalvo. The transaction, however, was aborted when it was discovered that Pearson and DiSalvo were going to buy the cocaine they proposed to sell to Mengrone from Visciglia and his partner: the same men who were supposed to purchase the kilo of cocaine from Mengrone. (Tr. 653-60).*

In early July, 1973, Mengrone, Ricco and Bragiolo agreed to purchase six kilograms of pure heroin from co-conspirator James Venia for \$210,000. Bragiolo told Mengrone that they would accomplish the transaction by first buying one kilo, testing it for purity and, if acceptable, purchasing the remaining five kilos. Bragiolo later instructed Mengrone to go to Angelo Ricco's house to pick up \$35,000 with which to buy the first kilo, but under no circumstances to give the money to Venia in advance of Venia's delivery of the heroin to Mengrone. Mengrone then went to Angelo Ricco's house and Ricco gave him \$35,000 which he took from a shopping bag filled with cash. The next day Mengrone, contrary to Bragiolo's instructions, gave Venia \$33,000 ** on Venia's promise that he would give Mengrone the kilo at a later time. Thereafter, Venia was unable to produce the kilogram of heroin. Venia told Mengrone that Venia's connection, Blackie, took the money but did not return with the heroin. Venia gave Mengrone Blackie's address and suggested to Mengrone that he give it to his "people." Mengrone related what had happened to Bragiolo and Ricco, who were angry about the loss of the money. However, Bragiolo told Mengrone not to be overly concerned because they had the address and would kidnap one of the connection's children to ransom against the return of

* Pearson, who pleaded guilty to related state narcotics charges prior to trial, also testified to this aborted transaction. (Tr. 854-60).

** Mengrone embezzled \$2,000 for himself. (Tr. 670).

the money. Mengrone told Bragiolo and Ricco that he wanted no part in the kidnapping of children. (Tr. 661-74).

7. Mengrone is arrested.

From July through late October 1973, Mengrone continued working for Bragiolo and Ricco in their narcotics business. In later October 1973, Mengrone was arrested by state authorities while in the midst of a proposed transaction to sell three kilos of heroin supplied by Bragiolo and Ricco to an undercover agent for \$105,000. (Tr. 687-98).

B. The Defense Case.

Bragiolo presented no evidence in defense of the charges.

ARGUMENT

The Testimony of Peter Mengrone Was Properly Admitted into Evidence.

Ricco contends that Judge Lasker erroneously admitted the testimony of Government witness Peter Mengrone. His argument is based upon the fact that prior to trial Mengrone listened to tape recordings and read transcripts of conversations recorded during the course of a New York state court-authorized interception of wire communications on Mengrone's telephone, evidence of which was suppressed by Judge Lasker because of the state's delay in having the original tapes sealed. See *United States v. Gigante*, 538 F.2d 502 (2d Cir. 1976); *People v. Nicoletti*, 34 N.Y. 2d 249 (1974). His argument is meritless.

A. Background

On August 17, 1973, Westchester County Court Judge John C. Cousins, pursuant to the New York eavesdropping statute, CPL § 700.05, *et. seq.*, signed an order permitting state law enforcement officers to intercept wire communications on Mengrone's telephone through September 18, 1973. On September 18th, Judge Cousins signed an extension order, permitting the state to continue to intercept conversations on Mengrone's telephone through October 18, 1973. On October 18th, Judge Cousins signed a second extension order, permitting the state to continue to intercept conversations on Mengrone's telephone through November 17, 1973.

On October 24, 1973, Mengrone, the subject of the wiretap orders, was arrested on a narcotics charge and the state terminated the wiretap. On November 5, 1973, twelve days after the termination of the wiretap, Judge Cousins sealed the original tape recordings.

In January 1976, during the trial of *United States v. Angelo Ricco, et al.*, which occurred prior to this Court's decision in *United States v. Gigante, supra*, various telephone conversations, recorded pursuant to the wiretap warrants, between Mengrone and his co-conspirators, including Anthony Ricco, were admitted into evidence during Mengrone's appearance as a Government witness. Prior to the January 1976 trial no motion was made to suppress the wiretap evidence on the grounds that there was a delay in sealing.

On July 21, 1976, following this Court's decision in *Gigante*, Anthony Ricco moved to suppress the tape recordings on the ground that they were improperly sealed.

* This trial involved the appellant, Anthony Ricco's, co-conspirators.

Ricco also moved to suppress Mengrone's entire testimony claiming that it was "tainted" by his having listened to his own telephone conversation with Anthony Ricco and their co-conspirators prior to and during the first trial.

Following a two-day evidentiary hearing on August 31, and September 1, 1976, with respect to the reason of the twelve day delay in sealing, Judge Lasker issued an order on September 28, 1976, suppressing the wiretap evidence based upon his finding that the delay in sealing the tapes was inexcusable. *United States v. Anthony Ricco*, 421 F. Supp. 401 (S.D.N.Y. 1976). Judge Lasker, however, denied Ricco's motion to suppress Mengrone's testimony.

Prior to appellant's trial, Mengrone listened to the tape recordings and read transcripts of his conversations with his co-conspirators. Of course, during the trial of Anthony Ricco neither the tape recordings nor the transcripts of Mengrone's telephone conversations was offered in evidence. The great bulk of Mengrone's testimony on direct examination concerned events and conversations which were unrelated to the wiretap. Mengrone did, however, testify on direct examination to two conversations, which were recorded pursuant to the intercept orders.* (Tr. 688-91).

On direct examination Mengrone was not shown any transcriptions of taped conversations to refresh his recollection or for any other purpose. However, on cross-examination Mengrone was asked, on two occasions, to read transcriptions of suppressed tape recordings for the

* The Government concedes that Mengrone was shown a transcription of his telephone conversation on October 18, 1973, with the appellant a short time prior to his trial. (Tr. 4-5). This identical conversation was played—without objection—to the jury during Mengrone's appearance as a Government witness in January 1976 at the trial of *United States v. Angelo Ricco, et al.*

purpose of refreshing his recollection and impeaching his credibility (Tr. 772-74; Ricco Exhibits C and D for identification).

Neither Ricco nor anyone else has ever contended that any taped telephone conversation was in any way tampered with. Moreover, Ricco has never contested the truth of Mengrone's testimony about this conversation on October 18, 1973, which was that Ricco then agreed to supply three "boy cars" (three kilos of heroin) to one of Mengrone's customers (Tr. 688-91).

B. The Law

Ricco's argument that Mengrone's testimony should have been suppressed is based exclusively upon New York C.P.L. § 700.65(3), which provides as follows:

"Any person who has received, by any means authorized by this article, any information concerning a communication, or evidence derived therefrom, intercepted in accordance with the provisions of this article, may disclose the contents of that communication or such derivative evidence while giving testimony under oath in any criminal proceeding in any court or in any grand jury proceeding; provided, however, that the presence of the seal provided for by subdivision two of section 700.50,* or a satisfactory explanation of the absence thereof, shall be prerequisite for the use or disclosure of the contents of any communication or evidence derived therefrom."

* CPL § 700.50 requires that "[i] immediately upon the expiration of the period of an eavesdropping warrant, the recordings of communications . . . must be made available to the issuing justice and sealed under his directions."

This provision quite clearly precluded the introduction at trial of the tapes and transcriptions reflecting Mengrone's conversations with his co-conspirators including the appellant, Anthony Ricco. It did not, however, preclude the use or disclosure prior to trial by representatives of the Government of transcriptions of Mengrone's taped recorded conversations for the purpose of refreshing his recollection.

This is clear, first, from the face of the statute itself. Section 700.65(3) prohibits, in the absence of a seal, use or disclosure of the contents of an intercepted communication, or evidence derived therefrom, by a witness "while giving testimony under oath in any criminal proceeding or any grand jury proceeding. . . ." Nothing in this prohibition would prevent a participant to an intercepted conversation from testifying to the conversation from his independent recollection of that conversation. Of course, under the time-honored practice of refreshing a witness' recollection, the witness is only permitted to testify to an independent present recollection, as Mengrone did here. Thus, what was "used or disclosed" in this criminal proceeding was Mengrone's recollection and not the tapes or the transcripts. The prohibition of § 700.65(3) therefore does not apply.

This issue was considered under an earlier eavesdropping statute in *Monroe v. United States*, 234 F.2d 49 (D.C. Cir. 1956), *cert. denied*, 355 U.S. 875 (1957), which held that it was not improper to use tapes of an illegally intercepted communication to refresh a witness' recollection. The Court stated as follows:

"We do not reach the question because, assuming interception, no use of the recorded telephone conversations brought about reversible error in this trial. The recordings were not offered or admitted in evidence. The principal use made of them was by Lt. Thoman when, before giving his own testi-

mony of the conversations recorded in this manner, he refreshed his recollection by playing the recordings. However, since he was himself the recipient of the messages, or a participant in the conversations, the connection between any possible violation of the statute and his testimony had 'become so attenuated as to dissipate the taint' in its relation to admissibility. *Nardone v. United States*, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307. See, also, *Sullivan v. United States*, 95 U.S.App.D.C. 78, 219 F.2d 760. Lt. Thoman's testimony was not itself the product of an illegal interception; he repeated on the stand what he himself had heard. The aid the recordings gave to his recollection did not require the trial court to exclude his knowledge from the jury." 234 F.2d at 56-57.

As in *Monroe*, in this case it was the witness' knowledge and not the tapes which were used at trial.*

Recognizing this fundamental weakness in his argument, Ricco argues that there was a "use" of the tapes at trial because reviewing the transcripts may have provided Mengrone with "data to adopt in his testimony

* *Monroe v. United States*, *supra*, is cited in the legislative history of 18 U.S.C. § 2517(3), the federal analogue to § 700.65(3), S. Rep. No. 1097, 90th Cong. 2d sess. (1968), quoted in U. S. Code, Cong. Admin. News, 1968 at 2188-89. The Senate Report states that disclosure under § 2517(3), where there is a sealing requirement, would include "the use and disclosure of such evidence at trial to establish guilt directly (*New York v. Saperstein*, 2 N.Y.2d 210, 140 N.E.2d 252 (1957)), or to corroborate (*United States v. Walker*, 320 F.2d 472 (6th 1963)), or to impeach (*People v. Hughes*, 203 Cal. App. 2d 598, 21 Cal. Rptr. 668 (1962)), a witness' testimony or to refresh his recollection (*Monroe v. United States*, 234 F.2d 49 (D.C. 1956), *certiorari denied*, 78 S.Ct. 114, 355 U.S. 875 (1957))." As noted in the text, *Monroe v. United States*, *supra*, permits the use of inadmissible, intercepted evidence to refresh a witness' recollection.

where he had no independent recollection." (Br. 11). However, Ricco cannot rely on this speculative assertion in this Court having failed to establish it as a fact at trial. Indeed, in the opinion denying the motion to suppress Mengrone's testimony, Judge Lasker specifically invited defense counsel to attempt to establish any "taint" in Mengrone's testimony by testing on cross-examination "his independent recollection and/or credibility . . . by establishing his opportunity to study the tapes." 421 F. Supp. at 411. Cross-examination did not succeed in showing that Mengrone lacked an independent recollection and, absent such a showing, appellant cannot claim in this Court the tapes were used at trial in place of Mengrone's independent recollection.

The inapplicability of § 700.65(3) is clear not only from the face of that statutory subsection, but from a reading of the related subsections, which Ricco conveniently ignores. Sections 700.65(1) and (2) of New York Criminal Procedure Law which provide as follows:

"1. Any law enforcement officer who, by any means authorized by this article, has obtained knowledge of the contents of any intercepted communication, or evidence derived therefrom, may disclose such contents to another law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

"2. Any law enforcement officer who, by any means authorized by this article, has obtained knowledge of the contents of any intercepted communication, or evidence derived therefrom, may use such contents to the extent such use is appropriate to the proper performance of his official duties."

Relying on these provisions, this Court in *United States v. Fury*, 554 F.2d 522 (2d Cir. 1977) recently held that taped recordings suppressed due to a delay in sealing could be utilized by law enforcement officers for the purpose of establishing probable cause for another wiretap warrant without rendering the fruits of the second wiretap inadmissible.* Thus, these statutory provisions and their federal counterparts** make clear that law enforcement officials may disclose wiretap evidence, including transcriptions of tape recorded conversations in furtherance of their official duties despite the fact that the tape recorded conversations were not sealed at all or, less seriously, there was a short, inexcusable delay, as here, in sealing. *United States v. Fury, supra*. Unquestionably, the Assistant United States Attorney's pre-trial disclosure to Mengrone of transcriptions of his actual telephone conversations for the purpose of refreshing Mengrone's recollection was within the "proper performance of [the Assistant United States Attorney's] official duties," namely, to prepare a case for trial.

The applicability of § 700.65(2) and the total propriety of using these tapes to refresh Mengrone's recollection becomes indisputable when one considers that,

* Ricco's conclusory attempt to distinguish the impact of *Fury*, by claiming in a footnote that it involved derivative use while the use here was testimonial, is frivolous. (Br. at 11, n.). Mengrone only testified on direct examination about two conversations which were recorded, not as Ricco implies, to hundreds. Moreover, Mengrone did not testify to the transcripts; indeed, he used them to refresh a pre-existing recollection of his own conversations.

** The federal statutes, after which the New York statutory scheme is modeled and with which the New York statutes are almost identical, see *United States v. Fury, supra*, are Title 18 U.S.C. §§ 2517(1)-(3), 2518(8)(a).

under the provisions of 18 U.S.C. § 3500, the Government would surely be required to "disclose" to the defense the tapes of conversations about which Mengrone had testified. The absence of a seal would not obviate the Government's obligation to furnish such 3500 material. Moreover, there can be little doubt but that defense counsel would be permitted to make "use" of unsealed tapes at trial for impeachment or, indeed, refreshing the witness' recollection. These disclosures and uses of unsealed tapes must necessarily be encompassed by § 700.65(2) which permits the prosecutor to use tapes—with or without a seal—in "the proper performance of his official duties."

The point is particularly apt in this case in view of the fact that Ricco's trial counsel chose to display transcripts of the tapes to Mengrone on cross-examination for the purpose of impeaching his credibility and refreshing his recollection. (Tr. 772-74). To accept Ricco's position on this appeal, it would be necessary to conclude that he was not entitled to make that use of the transcripts at trial. Such a result would be anomalous and would be in derogation of the right to cross-examine witnesses by use of prior statements.

As a final point, Ricco argues that the transcripts used by Mengrone to refresh his recollection were "unverified" (Br. 12), suggesting that Mengrone's testimony was thereby infected. This claim overlooks the fact that defense counsel, having had access to both the tapes and the transcripts, failed to assert at any point that they were inaccurate in any way. Moreover, anything may properly be used to "revive a memory: a song, a scent, a photograph, an allusion, even a past statement known to be false." *United States v. Rappy*, 157 F.2d 964, 967 (2d Cir. 1946) (L. Hand, J.J.), *cert. denied*, 329 U.S. 806 (1947). Similarly, it is beyond dispute that a document or tape recording used to refresh recollection need

not itself be admissible evidence. See *United States v. Schwartzbaum*, 527 F.2d 249, 253 (2d Cir. 1975); *Mitchell v. American Export Isbrandtsen Lines, Inc.*, 430 F.2d 1023, 1028-29 (2d Cir. 1970); *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 191 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *Monroe v. United States*, *supra*; *United States v. McKeever*, 271 F.2d 669, 670-72 (2d Cir. 1959). Indeed, defense counsel himself recognized these principles in using the transcripts of the tapes to refresh Mengrone's testimony on cross-examination.*

Even assuming for the purpose of argument that a delay in sealing would otherwise preclude the use of transcripts to refresh a witness' recollection as to his own conversations, it is clear that Ricco is estopped from raising it here. Prior to the trial of his co-conspirators in January 1976, Ricco moved for a severance. He alleged that one of his co-defendants, his nephew Angelo,

* Ricco's alternative request for a remand for a hearing to determine whether Mengrone had any independent recollection of his testimony of wiretaped conversations is also meritless. First, although immediately before the selection of the jury Ricco's attorney raised the hearing issue with Judge Lasker, he failed to cite any authority for the necessity of hearing at that time, nor for the duration of the trial although specifically requested by Judge Lasker to do so. (Tr. 1-6). Indeed, after raising the matter initially counsel never again referred to it. Secondly, counsel made no objection to that portion of Mengrone's testimony on direct examination during which he testified to two conversations which were recorded during the wiretap. Thirdly, although given the opportunity on cross-examination to make inquiry into this matter, counsel failed to do so. On the contrary, he himself refreshed Mengrone's recollection on cross-examination as to other conversations Mengrone had which were recorded during the wiretap. Finally, there is nothing in the record to indicate that Mengrone's testimony to the two conversations in question was based on anything but an independent recollection, albeit refreshed.

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would testify in Ricco's behalf at a separate trial of Ricco but did not wish to testify on his own behalf in a joint trial. Therefore, Ricco requested that he be severed to give his nephew an opportunity to testify on Ricco's behalf at a second trial. His motion was granted and he was severed. The disingenuousness of Ricco's motion became apparent when he presented no witnesses on his own behalf at his trial. More importantly, no motion to suppress the Mengrone wiretap on the grounds that the tapes were improperly sealed had been made by Ricco or anyone else prior to the first trial. Thus, during that trial the tapes, including the ones Ricco complains about here, were played to the jury during Mengrone's appearance as a Government witness. It was only after the first trial, and following this Court's decision in *Gigante*, that Ricco moved to suppress the tapes along with Mengrone's "tainted" testimony. By this time, however, Mengrone had already in open court "legally" listened to and read transcripts of his conversations. As Ricco did not raise his objections prior to the first trial but instead moved to get himself severed, he should not be allowed to exploit the untenable situation in which the Government found itself after the first trial in which Mengrone had already used the "now tainted" evidence to refresh his recollection. To hold otherwise would amount to an *ex post facto* penalization of the Government. See *Alfano v. United States*, 555 F.2d 1128 (2d Cir. 1977).

Finally, Mengrone only testified on direct examination to two telephone conversations which were recorded during the wiretap and only one of these was with Ricco. (Tr. 688-91). Both conversations related to the sale of three kilos of heroin by Ricco to one of Mengrone's customers, which was the subject of Count 11 of the Indictment. All of Mengrone's other testimony on direct examination concerned narcotics transactions and conversations with Ricco and others which were entirely unrelated

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to the wiretap. Thus, because that portion of the wiretap "used and disclosed" at trial was negligible (four pages of proof) in view of the large amount of other evidence introduced against Ricco, the error, if any, in admitting the testimony, was harmless.* *Chapman v. California*, 386 U.S. 18 (1967); *United States v. Head*, 546 F.2d 6, 8 (2d Cir. 1976) (in light of Government's strong case, admission of evidence allegedly seized illegally as most harmless error); *United States v. Cheung King Ping*, 555 F.2d 1069 (2d Cir. 1976) (admission of statement possibly taken in violation of *Miranda* harmless error).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

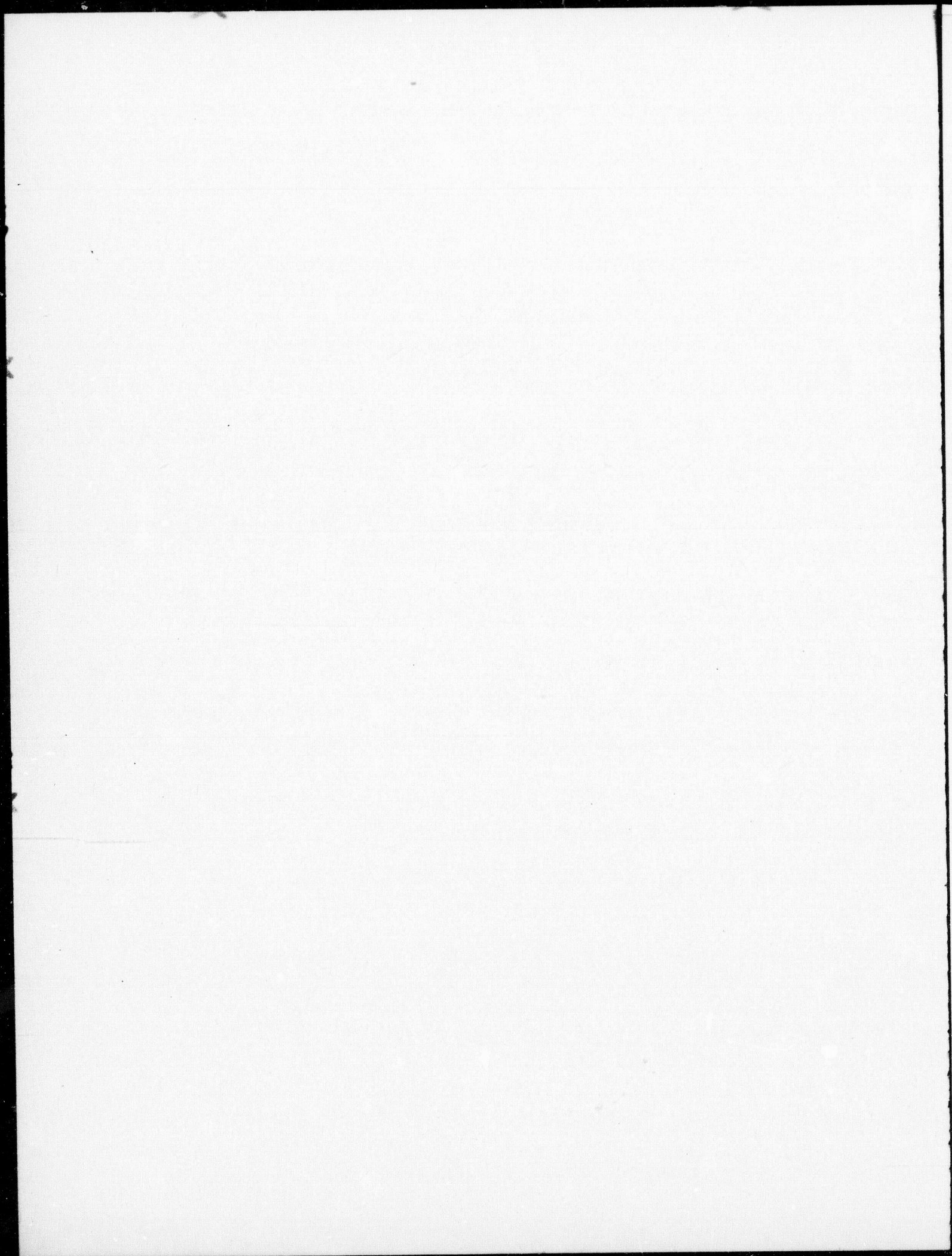
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 AUDREY STRAUSS,
 ROBERT J. JOSSEN,
*Assistant United States Attorneys,
 Of Counsel.*

* Even assuming the error was not harmless, Ricco is entitled only to a reversal on Count 11. The other counts on which he was convicted, not being based on testimony on which Mengrone refreshed his recollection by reading transcripts, and having no connection at all with the wiretap, cannot be successfully attacked.

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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Frederick T. Dour being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District of
New York.

That on the 23 day of *Sept* 1977
he served ^{two} a copy of the within *Letter*
by placing the same in a properly postpaid franked
envelope addressed:

J Jeffrey Weisenfeld
401 Broadway
New York N.Y.

And deponent further says that he sealed the said en-
velope and placed the same in the mail drop for
mailing the United States Courthouse, Foley
Square, Borough of Manhattan, City of New York.

Frederick T. Dour

Sworn to before me this

23 day of *Sept* 1977

Mary L. Auer
MARY L. AUER
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1979